SOME NOTES ON RESEMBLANCES OF HEBREW AND ENGLISH LAW[1].

THE law of which I am about to speak is concrete law, not theories of law, but actual working rules of law or specific laws. I confine myself to the English Bible—generally to the Authorised Version. I feel strongly how much this little essay must suffer from my ignorance of post-biblical literature, especially the Talmudic. For its writers and thinkers were necessarily in a better position to comment on their classical writings, and, moreover, they must have had scholarly and legal traditions.

To begin with, Hebrew law does not make the distinction between Civil and Criminal law, which, after all, is quite artificial, and between which in English law the line is not always clearly drawn. Certainly there is no trace of two corresponding kinds of tribunal—to us, frequently, the only *visible* sign of a difference. For instance, who would suppose that the non-repair of a highway—"the king's highway" (Num. xxi. 22)—was a crime, if it was not punishable on indictment after a trial by jury exactly as in a case of theft? Yet, in fact, there are many provisions of which the only object is to punish the wrongdoer—as a deterrent to others,—where there is no provision for compensation to the sufferer, and others where, except such compensation, there is no recognition that the state has an interest in preventing illegality—and this, after all, is the broad distinction in our system between the criminal and the civil. As jurisprudence progresses, it will be more and more felt that any infraction of the law is an offence against the state, because the slightest disobedience to the

[1] Adapted from an address to the Jews' College Union Society.

law sets a bad example and tends to weaken public morality. But regarding only actual standards, I should say that much of the Hebrew civil law, some of the Decalogue, for instance, is elementary public morality—of course, evolved slowly from generations of custom—embodying the custom, the ideal custom, of the time in which it is promulgated, but without any express penal sanction. For instance, we may be sure that in the society which was exhorted to honour parents and not to covet other people's goods, as in our own, the notorious offender against these principles was made to feel the disapproval of his "set," without any formal prosecution.

For the purposes of comparison, then, attaching no importance to the distinction between civil and criminal, I find that topics common to Hebrew and English law are the following:—Arson, Assault, Bailees, Blasphemy, Breach of Promise of Marriage, Burglary, Dangerous Animals, Debt, Kidnapping, Maintenance, Manslaughter, Murder, Negligence, Perjury, Perversion of Justice, Pledges, Poor Law, Real Property, Sanitary legislation, Succession, Theft—a list comprising Contract, Tort, and Crime. Finally there is the Assessment of Damages, and Procedure and Punishment.

A few words on each head, but not always in this order:—

Exod. xxii. 6 is hardly a case of **Arson**: rather of negligence with damages.

Bailees. Exod. xxii. 7–15; Lev. vi. 2–5.

The distinction between *gratuitous* or *for reward* is not made. Assuming bailment here to be *gratuitous*, then the law is that of Lord Hale: "the bailee is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect"; then he is chargeable. If the bailee pays for the use of the thing (ver. 15), "if it be an hired thing, it came for his hire," then the hirer is only bound to use the same care as a prudent man would of his

own, i.e. a lesser degree than the utmost, which seems to be meant here.

Where the bailee not only has nothing to get but has work to do on the thing, he is only liable for gross negligence.

An agister of cattle does not insure their safety, but if they are killed, injured, or stolen through his negligence, he is liable (v. 13). In Smith *v.* Cook, 45 L. J., Q. B. (1875), a colt agisted was gored to death by a bull: agister held liable, only because there was negligence. Thus, though the details are not the same, the principles are similar.

Ver. 15. The stipulation that if the owner be with it the bailee is not liable for damage is exactly analogous to our rule, that if a contractor's employer personally controls the work he and not the contractor is liable for injury. The reason is obvious.

Lev. vi. 2–5 adds nothing to this topic except as to lost property, for keeping which there may be, as with us, damages: with us it may be larceny also.

Blasphemy. Exod. xxii. 28. Thou shalt not revile *God* [*or* the judges, R.V., the gods, A.V.].

The *Law Mag. and Rev.*, Nov. 1907, writes:—"Until lately we punished offences against religion as severely as Moses did." This, perhaps, refers to the Hebrew punishment of idolatry and paganism—the prohibition of which can hardly date from the same age of thought as the toleration of "the gods," if A.V. is right above, which it probably is not. Otherwise there seems to be no formal enactment in favour of religion as *such*, except this—which, by the way, is highly inconsistent with a theocracy, as the early Hebrew State is sometimes described, for in a theocracy, blasphemy and kindred offences are inconceivable and assumed not to exist. "Nor curse the ruler of thy people." Seditious Libels are by no means extinct crimes to-day. Compare *Scandalum Magnatum.* Till 1887 an action lay for defamation or slander of a great officer, e.g. a judge: the last instance was in Queen Anne's reign.

If the translation "judges" R.V. above is correct, it is the law of England to-day, common in cases of Contempt of Court. This leads to Perversion of Justice: —

Perversion of Justice.

The constant references to this crime point to a settled judicial system, indeed, they are the best evidence of it. The three great forms of tampering with the administration of justice are partiality of the judge, perjury of the witness, and interference of a third party.

The law of this country is well provided against the peculation or favouritism of the judge, as it has had need to be. To the judge Exod. xxiii. 2, 8 are clearly addressed: the exhortation not to be swayed by popular clamour is never out of date. Perhaps "neither shalt thou speak in a cause, &c." is meant for the witness as well as the judge, especially if we read with R.V. "bear witness" for "speak." In this context we are justified in understanding "thou shalt not oppress a stranger" as a hint to the judge that justice knows no nationality.

Breach of Promise of Marriage. Exod. xxii. 16; Deut. xxii. 28–9.

In certain cases a breach of promise is *assumed*, and *specific performance* is, if possible, decreed. Thus this goes further than our law as the father's proprietary rights are *also* recognised, and damages are awarded him, just as in a somewhat similar action in our law.

This form of breach of contract is expressly recognised in the case of the female servant, Exod. xxi. 8. Probably it was inconceivable in any other case, i.e. after betrothal of a freewoman.

Theft and Burglary. Decalogue and Exod. xxii. 1.

These ordinances are surprisingly scanty, but obviously contemplate a society with few personal chattels as we should think. There is restitution as with us, but damages in lieu of imprisonment: it must be remembered that

many ancient peoples had no prisons in our sense. But note that ver. 3, "if he have nothing, &c." is literally the earliest instance of penal servitude.

Note the law of homicide of a burglar—practically ours. You may kill in self-defence, and in justifiable homicide the element of its being night—essential to burglary—is always matter of mitigation. To this day "breaking" (ver. 2, "up," A.V.: "in," R.V.) must be alleged in an indictment for burglary.

Kidnapping. Exod. xxi. 16.

This form of stealing, perhaps, arose from the slave trade, like kidnapping, to supply the American plantations with servants. 43 Eliz. c. 13 was due to the capture of many subjects in the northern border counties. East (I, 430) in 1890 expressly wishes the offence was capital in place of many others.

Debtors. Deut. xv. 1–18.

In this country it clearly corresponds to (i) the Statute of Limitations; (ii) as ver. 12 clearly shows, Imprisonment for Debt. This used to be met by periodical Insolvent Debtors' Acts which cleared the prisons. Cf. a discharge in bankruptcy to-day, which is, in effect, a starting fresh after a time.

Pledges. Deut. xxiv. 6, 10–13.

This rather recalls the law of distress than that of pawnbrokers. Both are part of the law of debt, and the finances of the proletariate have always been the subject of legislation.

Notice that some chattels are not negotiable, so to say, as in a distraint implements of trade and wearing apparel are exempt—exactly as in Exod. xxii. 26: so here, the latter can only be taken for a day.

Ver. 10 looks like the doctrine "a man's house is his castle"—to prevent inquisition.

Vers. 12–15 clearly contemplate a day labourer—even now a class paid daily. The spirit of these verses is that of the Truck Act, 1831.

Crimes of Violence. Assault, Murder, Manslaughter.

Assault. The *lex talionis* is now admitted to be a mitigation of an earlier system. It means "do not take more than one eye for one eye," and as to life, no blood-feuds. There seems to be no instance (except Adoni-bezek, Judges i. 6–7, and that not judicial) of its literal application—except for murder. Probably it was early commuted to a pecuniary tariff. This is perfectly clear from the context, Exod. xxi. 18–19, 20–1, 26–7.

The right to moderate "correction" or chastisement of servant or apprentice exists in English law.

Murder and Manslaughter. Exod. xxi. 12. The law is in some respects like ours—with regard to the evidence of motive, the weapon used, the punishment, and Coroner's inquisition (Deut. xxi. 1). Circumstantial evidence seems to have been admitted, if there was corroboration.

As to motive, see Exod. xxi. 13–14; Num. xxxv. 20–1; Deut. xix. 4–11. As to weapon, see Exod. xxi. 20; Num. xxxv. 16–18. As to the inquest, note the local responsibility (Deut. xxi. 2).

The law, too, as to justifiable homicide (Exod. xxii. 2–3) seems to be on our principle, when a man is slain in committing a felony.

Note, too, the touch, Exod. xxi. 21, "if he continue a day or two." So v. 19, "if he rise again and walk abroad." The interval makes all the difference: in our common law it is a year and a day.

Substantially there is our distinction between murder and manslaughter—a natural distinction. The "avenger of blood" (Deut. xix. 6) or "revenger" (Num. xxxv. 19) is clearly the earliest *private prosecutor*, no doubt earlier than the State. From the *vendetta*, in primitive times as now, there is only one way of escape—flight, and the farther the better—"the way is long" (Deut. xix. 6)—if possible, out of the jurisdiction, or out of the territory, as Jeroboam fled to Egypt (1 Kings xi. 40). Then after a time comes the demand for surrender or extradition, by the prosecutor,

literally, the follower-up. There is a judicial enquiry (Num. xxxv. 24), just as now, whether the offence is extraditable, which only murder is. If it is, the punishment is certain death, for by vers. 12–13 there is no commutation, and the avenger is entitled to the culprit (Num. xxxv. 19). But, on the other hand (Num. xxxv. 25), if they find manslaughter, there is still punishment—banishment in the place of refuge for an indefinite period—quite a definite punishment, for if he breaks bounds, the right of the revenger reverts. If he serves his sentence the prosecutor's right is gone, his blood has had time to cool, whereas at first his "heart" was "hot" (Deut. xix. 6)—the exact distinction of our law—and to kill him would be murder. Note that the doctrine of *sanctuary* is ecclesiastical not Hebrew: Exod. xxi. 14, the murderer is to be taken even from the altar—and to execution.

Negligence.

In the case of a bailee this ground for damages has been clearly recognised. The same principle is seen in Exod. xxi. 33—a case common in our courts which administer this very law. Note a real juridical touch in the property of the dead beast passing to the defendant who has paid damages for it. The principle of negligence is recognised both civilly and criminally (ibid., 28–36) in the instance of—

Dangerous animals. Criminally, just as our law regards the letting loose *wilfully* a vicious animal as murder, if it kills; so here death is decreed.

Civilly, not only are damages allowed, but the doctrine of the "one bite," notorious in the case of the English dog, is implied in the distinction between the known and unknown propensities of the animal.

Perjury. The Decalogue; Exod. xxiii. 1; Deut. xix. 16–20.

Law Mag. and Rev., as above: "The perjurer was to undergo the punishment which he sought to bring upon

his innocent neighbour by his perjury. This is a much more rational rule than that of the English law, under which murder by perjury—the worst kind of murder—is only punishable by . . . penal servitude."

Now, it happens that on this point—where false witnesses have sworn away the life of an innocent man—there was, in a case where men had been executed for robbery, a great legal discussion whether this amounted to murder, and the gang of miscreants were actually indicted for murder. But the prosecution on that charge was dropped and the point was never settled. I have no doubt that in Hebrew law this form of the *lex talionis* applied directly, partly because it is repeated in this passage (Deut. xix. 21) and partly because in Exod. xxiii—where, as we have seen, the administration of justice is dealt with, ver. 7 is " keep thee far from a false matter: and the innocent and righteous slay thou not."

Maintenance. Exod. xxiii. 2 may refer to testimony or to unwarrantable interference with the course of litigation. The next verse clearly refers to the latter, which is punishable by English law. So, too, Lev. xix. 15, " thou shalt not respect the person of the poor." I am not aware of any other system which formally discourages partiality even from charitable motives—the tendency is generally in favour of another class. This clearly means when the cause is unjust. It is no offence in English law to maintain a poor suitor in an honest claim, nor is it against the spirit of Hebrew legislation, but quite the reverse.

Poor Law. Deut. xiv. 28–9.

I suppose this is the first poor law. Tithe is one of the few institutions taken direct from Hebrew civilisation.

Real Property.

It has been said that the Hebrew land-system was that of " peasant proprietorship " (*Law. Mag. and Rev.* above).

Encyc. Biblica (" Law and Justice ") says that no *ger* could

hold land, owing to the operation of the year of jubilee, and cites Mic. ii. 5; Is. xxii. 16, and Ezek. xlvii. 22, "where the permission to do so is brought in as an innovation." But except the last, these passages seem to me to have little to do with the matter. He could certainly hold Hebrew slaves till the jubilee (Lev. xxv. 47). At any rate till 1870 (Naturalisation Act) an alien could not own or lease land in this country.

There is a Statute of Distributions (Num. xxvii. 7–11). The doctrine of next-of-kin is naturally recognised.

Sanitary Legislation.

Lev. xiv. 34–48 deals with insanitary dwellings: the Local Authority is the *priest*, who may order disinfection. A quite recent writer in the *Law Mag. and Rev.*, Nov. 1907, on "the Law of Moses" says: "a century since it was badly wanted in England." There is abundance of it now.

Weights and Measures.

Lev. xix. 35–6; with this 41–2 Vict. c. xlix, s. 25—Weights and Measures Act—coincides verbally to some extent.

Damages.

Various instances are Exod. xxi. 22, 30, 36, xxii. 1; Lev. vi. 5. 2 Sam. xii. 6, David gives judgment of death and of four lambs for one. Note especially Exod. xxi. 22—the judges fix the amount.

Procedure.

There was certainly a regular system, becoming more definite with time. It was based on the still prevalent system in the East of a rank of local notables—cf. our borough and county J.P.'s—but how appointed we do not know: in history they are called "elders." Two distinct accounts (Exod. xviii. 13–14 and Deut. i. 13–17) trace this system to one dictator or reformer—Moses: both profess distinct

juridical practice. Originally one judge sits "alone" (Exod. xviii. 14) like the Chancellor used to in England. Then deputies are appointed, like the vice-chancellors, and there is an appeal to the chief judge (Exod. xviii. 22, so Deut. i. 17), or later, perhaps, to the Crown. Or ver. 22 may mean a distinction according to the magnitude of the litigation—like ours between County Court and High Court. The business of the Court is distributed, Exod. xviii. 21, 22—who are the rulers of 1000, 100, 50, 10? It cannot be a gamut of appeal courts—that wealth of litigation is reserved for us. I suppose the numbers are those of population, i.e. so many justices, so to say, to every ten householders. If so, we may compare it with our existing "hundreds"—"originally so called because each consisted of a hundred families of free-holders or ten tithings. Each hundred formerly had its Court" (Sweet, *Law Lex.*). Perhaps the inferior courts stated a case for the Supreme Court: Deut. xvii. 8–11 looks like it. There is an appeal to the king in person—the woman of Tekoah (2 Sam. xiv). So the judgment of Solomon (1 Kings iii. 16), who built himself a new court-house (1 Kings vii. 7). The sovereign power will get the judicial, if it can; hence, the sacerdotal party puts the priests before the judges (Deut. xvii. 8–9).

The "Book of Judges[1]" illustrates the connexion between political power and the judicial. Samuel "judged" Israel (1 Sam. vii. 15) and actually went "circuit" (ibid., 16, 17) and sat "in all those places." So later, at the Restoration, Ezra re-organizes the judiciary (Ezra vii. 25). Otherwise, we know of no special officials: the *Shoterim* do not seem to have been specially legal, nor the "recorder" (2 Sam. xx. 24; 1 Chron. xviii. 14, 15), literally "remembrancer"—though belonging to the learned class and having a knowledge of precedents. In David's constitution (1 Chron. xxiii. 4) there were 6,000 officers and judges. These of

[1] The real translation of *Shofetim* is not *Judges* but Lat. *magistratus*. With Deborah cf. the famous Ann, Countess of Pembroke, &c., hereditary and acting Sheriff of Westmoreland (d. 1675). Hargrave on Co. Litt. 326 *a*.

course must have been distributed: and this is distinctly stated of Jehoshaphat (2 Chron. xix. 1, 5, 8–11). This is enjoined (Deut. xvi. 18): the elders in the gate are a permanent feature (Deut. xvii. 5), and (Deut. xxii. 15) they assess damages between husband and wife. The instance of Samuel, above, reads like modern. In Ezra's constitution (Ezra x. 14) elders and judges seem to be co-ordinate. Most instructive as to local tribunals is the story of Naboth (1 Kings xxi. 8), because the extortion is expressly to be committed in judicial form. The Crown commissions "the elders and . . . nobles" on the spot to try the issue. The tribunal may have been innocent.

The only known law of evidence is *Corroboration* (Num. xxxv. 30; Deut. xvii. 6, xix. 15), roughly our rule in perjury (and one or two other cases). The defendant sometimes gives evidence *on oath* (Exod. xxii. 11).

Arbitration is not unknown (Job ix. 33), "a daysman" and sureties are employed (Prov. vi. 1, xxii. 26).

There is a written deed of conveyance (Jer. xxxii. 9–10).

Punishment.

What punishment could they inflict? Ezra vii. 26 later enumerated: death, banishment, confiscation of goods, imprisonment. This was under the influence of foreign power and methods. Earlier: fines, either as compensation or penalty, flogging or death (Deut. xxv. 1–3, xxii. 18).

To sum up, in the words of a writer in the *Jewish Encyclopaedia* (Law, Civil): "After the period of the supremacy of ancient tribal customs, came the Torah, containing codes of law on various subjects. Here is the first law in the modern sense, a series of statutes and ordinances succinctly expressed and written down by the authority of a law giver. The Torah legislates for a stage of society higher than that of the nomad. It is intended for a people settled on the soil and devoted largely to agriculture. Herein will be found its limitations. It knows little of commerce or contract in the modern sense; its regulations

are comparatively primitive and are expressed in terse sentences and with little comment. The simplicity of the Biblical civil law is best illustrated by the fact that it is all contained in fifteen chapters of the Bible, and in some of these chapters occupies the space of only a few verses. The bulk of the civil law is found in two codes (Exod. xxi–xxiii and Deut. xxi–xxv) concerning slaves, land, inheritance, pledges, loans and interest, bailments, torts, marriage and divorce, and legal procedure. Exod. xviii and Deut. xvii treat of the constitution and jurisdiction of the courts: Lev. xxv and Deut. xv treat of the laws of the jubilee, of the sabbatical year, and of ransom; Lev. xix treats of the poor laws, and Num. xxvii and xxxvi of the laws of inheritance. This is substantially the entire Biblical civil law, which grew to enormous bulk in the Talmud."

"That these laws were intended for an agricultural people is obvious. The sale of land was not favoured. . . . Personal property other than that which is incident to the land, such as cattle, is hardly mentioned, and there are no regulations concerning its transfer except the general injunction to be just in weights and measures (Lev. xix. 35; Deut. xxv. 14, 15). Written contracts were unknown; all transactions were simple, and were easily made a matter of public record by being accompanied by the performance of some formal act in the presence of witnesses. Legal process was likewise simple; the judges spoke in the name of God [Exod. xxii. 28, 'Elohim' = A.V.'s 'Judges'], and it is not unlikely that the judgment of Solomon fairly represents the simple and direct method pursued by them in seeking to do justice. In doubtful cases the 'oath of the Lord' (Exod. xxii. 11) was administered to settle the matter."

Finally, I may cite Sir Robert Anderson, *Nineteenth Century* (Feb. 1908): ". . . the law of Sinai. Turning to that code, therefore, I seize upon two of its characteristic features. The one is the marked distinction it draws

between offences deliberately planned and offences due to sudden temptation or other accidental circumstances. That law had nothing but stern severity for deliberate lawbreakers, but in its treatment of the erring and the weak it was the most merciful code ever framed."

"And if effect were systematically given to that other feature of the code of the theocracy, and the interests and rights of the victims of crime were always remembered and enforced, the trade of the *professional* thief and professional receiver would be destroyed."

Those who are curious as to the direct borrowing of English law from Hebrew law may like to see the following passages:—

A.

Alfred. *D. N. B.* by E. A. F.—"What is specially characteristic of Aelfred's laws is their intensely religious character. The body of them, like other Christian Teutonic codes, is simply the old Teutonic law, with such changes—more strictly, perhaps, such additions—as the introduction of Christianity made needful. What is peculiar to Aelfred's code is the long scriptural introduction, beginning with the Ten Commandments. The Hebrew Law is here treated very much as an earlier Teutonic code might have been. The translation is far from being always literal; the language is often adapted to Teutonic institutions, while, on the other hand, some very inapplicable Hebrew phrases and usages are kept, and the immemorial Teutonic (or rather Aryan) institution of the *wergild* is said to be a merciful invention of Christian bishops."

Reference may also be made to an essay published since this article was in the printer's hands. It is on "King Alfred and Mosaic Law," by Prof. F. Liebermann. (See *Transactions of the Jewish Historical Society*, vol. VI, 1908, advance fascicule 2.)

B.

Maitland, *Mirror of Justices*, about 1300. "There is a curious trait of bibliolatry, a tendency to collect precedents out of the Old Testament and to find legal maxims in the ancient laws of the Hebrews, a tendency which the mediaeval Church very wisely repressed, for it leads to a justification of the judicial combat by the precedent of *David* v. *Goliath* and an acceptation of eye for eye and tooth for tooth."

The author (p. 109) actually says "proof in cases of felony and in other cases is made by combat," citing *David* v *Goliath*.

Plowden (1578) distinctly says that Christian kings have made their laws as near laws of God as they could, and therefore from Deut. xvii. 6 and xix. 15 there must be *two witnesses* at every trial.

HERMAN COHEN.